

D.T.E. 01-34

October 25, 2001

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' provision of Special Access Services.

ORDER ON VERIZON'S MOTION FOR PARTIAL RECONSIDERATION AND/OR
CLARIFICATION

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ORDER ON VERIZON'S MOTION FOR PARTIAL RECONSIDERATION AND/OR
CLARIFICATION

I. INTRODUCTION

On March 14, 2001, the Department of Telecommunications and Energy (“Department”) opened an investigation into Verizon New England Inc. d/b/a Verizon Massachusetts’ (“Verizon”) provision of special access services.¹ In the Order opening the investigation, the Department stated that it would investigate special access services provided by Verizon pursuant to state tariff.² Special Access Services Investigation, D.T.E. 01-34, Vote and Order to Open Investigation (March 14, 2001).

On August 9, 2001, the Department issued an interlocutory Order in this proceeding. In that Order, the Department denied AT&T Communications of New England, Inc.’s (“AT&T”) motion to expand this investigation to include investigation of special access services ordered out of the federal tariff.³ Special Access Services Investigation, D.T.E. 01-34, Order on AT&T’s Motion to Expand Investigation (August 9, 2001) (“Interlocutory Order”). The Department found that the FCC has exclusive jurisdiction over the quality of service of federally tariffed special access services. Id. at 11. The Department concluded that it is preempted from investigating and regulating quality of service of federally tariffed special

¹ Special access services consist of non-switched dedicated line services, and are used by interexchange carriers to connect their customers to the carrier’s point of presence for the exchange of long distance traffic. Special access services are also used to transmit high speed data.

² M.D.T.E. Tariff No. 15.

³ Federal Communications Commission (“FCC”) Tariff No. 11.

access services. Id.

In the August 9th Order, the Department required that Verizon provide data on interstate special access services in the same manner as intrastate special access services. Id. at 12. The Department found that intrastate special access services performance data provided previously by Verizon identified its performance for less than one percent of the special access services provisioned in Massachusetts over the past year, with the balance of special access services provisioned under the federal tariff. Because of the very small sample size associated with the intrastate data, the Department indicated that these data do not provide it with an accurate view of Verizon's provision of special access services in the Commonwealth. The Department noted that Verizon has stated that its provisioning of federal circuits is identical to its provisioning of in-state circuits. Therefore, in order to receive a statistically valid sample size of data with which to assess Verizon's intrastate performance, the Department required Verizon to submit interstate special access services provisioning and maintenance data. The Department stated that it will use data related to the provision of interstate special access services as evidence relevant to findings it may make regarding the reasonableness of intrastate special access services, but would not apply any findings or potential remedies to interstate services. Id.

On August 29, 2001, Verizon filed a Motion for Partial Reconsideration and/or Clarification ("Motion") of the Department's August 9, 2001 Order. Verizon asks the Department to reconsider or clarify that the interstate data provided to the Department would not be made part of the record evidence in this case or subject to investigation.

On September 28, 2001, the Department received comments on Verizon's Motion from AT&T, WorldCom Inc. ("WorldCom"), joint comments by XO Massachusetts, Inc. and CTC Communications Corporation ("XO" and "CTC"), and joint comments by Allegiance Telecom of Massachusetts, Inc. and PaeTec Communications, Inc. ("Allegiance" and "PaeTec"). On October 5, 2001, the Department received reply comments from Verizon, and joint comments from Cable & Wireless USA, Inc. and Global Crossing North America, Inc. ("C&W" and "Global Crossing").⁴ In this Order, the Department denies Verizon's Motion.

II. VERIZON'S MOTION

In its Motion, Verizon requests that the Department not include the interstate data as part of the record evidence in this case, or subject those data to investigation (e.g., discovery, testimony, briefing) (Motion at 1). Verizon argues that through mistake or inadvertence, the Department concluded that interstate data were needed in order to receive a statistically valid sample, because the intrastate data are too few to allow for a valid sample size (id. at 4). Verizon states that the intrastate data it provided to the Department in May 2001 are not a sample, but cover Verizon's entire customer base of intrastate special access circuits in Massachusetts (id.).

Furthermore, Verizon disputes that intrastate performance cannot be evaluated without examining fully interstate results because there are insufficient actual intrastate data from which to draw any conclusions (Verizon Reply Comments at 4). Verizon contends that the best and

⁴ Collectively, the competitive local exchange carriers ("CLECs"), with the exception of Verizon.

only evidence of Verizon's performance in providing intrastate special access services is actual data concerning those intrastate circuits (id. at 4-5).

Verizon also requests that the Department reconcile internal inconsistencies in the Department's Order. According to Verizon, the Department's decision to use data related to the provision of interstate special access services as evidence is inconsistent with its ruling that it has no authority to investigate or regulate such services (Motion at 4). Verizon urges the Department not to treat the interstate data as evidence, and to limit their use for informational or background purposes only (id. at 5; Verizon Reply Comments at 2). Verizon contends that if interstate data are treated as evidence in this proceeding, such treatment would inappropriately shift the focus of the proceeding into an investigation of interstate special access services (Motion at 4). Verizon further argues that the method used to gather and analyze the underlying data, and derive and display the results, was identical for the intrastate and interstate reports submitted to the Department (Verizon Reply Comments at 3).

III. COMMENTS

The CLECs filing comments unanimously contend that Verizon's Motion must be denied. The CLECs argue that Verizon's Motion does not meet the Department's standards for reconsideration or clarification (AT&T Comments at 2; XO/CTC Comments at 2). Several parties argue that the Department did not mistake the intrastate data submitted in May 2001 as a sample of intrastate provisioning numbers, but recognized the submittal as a complete set of data (XO/CTC Comments at 3; C&W/Global Crossing Comments at 2). XO and CTC further contend that Verizon has presented no previously unknown facts, there was no lack of notice

or opportunity for Verizon to present its case, and the Order is not silent or ambiguous (XO/CTC Comments at 3). WorldCom argues that the relief Verizon seeks is highly irregular, and that there is no precedent for the relief Verizon seeks (WorldCom Comments at 1-2).

AT&T discusses the need for the Department to draw statistically valid conclusions about the underlying special access provisioning process from available data (AT&T Comments at 2-3). AT&T argues that the Department's ability to reach statistically valid conclusions from extremely small sample sizes is severely constrained, and the Department needs to assure itself that a calculation from these data reflects systematic characteristics of the underlying provisioning process and is not merely a statistical fluke (id.; see also Allegiance/PaeTec Comments at 1). AT&T contends that only a statistical study including both the intrastate and interstate data will provide the Department with an accurate picture of the underlying process that Verizon uses to provision intrastate special access services (id. at 4). WorldCom agrees that an analysis of only the small number of intrastate circuits may not reveal the flaws in the provisioning process, and that expanding the circuits analyzed to include all of the circuits provisioned by that process greatly increases the chances of identifying the flaws in the process (WorldCom Comments at 3).

C&W and Global Crossing differentiate investigation for the purpose of regulation from investigation for the purpose of elucidation (C&W/Global Crossing Comments at 2).

WorldCom contends that the Department's investigation of federally tariffed services is permissible where the purpose of the investigation is legitimately within the state's jurisdiction (i.e., to determine whether some regulatory action is needed with respect to state tariffed

circuits), and the investigation of federally tariffed circuits will aid in that endeavor (WorldCom Comments at 2). In addition, WorldCom states that the Department needs to look at Verizon's federally tariffed services to determine whether the Department should seek delegated authority or assistance from the FCC regarding Verizon's special access services performance in Massachusetts (id.). Furthermore, WorldCom contends that without the interstate data, it is impossible to tell whether the level of service quality for Verizon's affiliates and end-user customers is the same as the service quality level for Verizon's competitors (id. at 4).

AT&T argues that the Department routinely enters into evidence facts relating to matters over which it has no authority to grant relief when such facts are relevant to matters within its jurisdiction (AT&T Comments at 4). Furthermore, AT&T contends that this fact does not mean the Department will lose sight of the issues to be adjudicated in the proceeding, and that any discovery, testimony, or briefing on facts that include interstate data will inform the Department's investigation of the provisioning process that Verizon uses to provide intrastate special access services (id. at 4-5). XO and CTC emphasize that no data are worthy as a basis for administrative decisionmaking unless discovery and cross-examination are allowed, and that parties need to probe the method and assumptions used by Verizon to produce the intrastate and interstate data (XO/CTC Comments at 4). Allegiance and PaeTec agree that data that are to serve as a basis of the Department's decision must be tested, and state that without the ability to investigate the accuracy of Verizon's data, parties will be denied their due process rights (Allegiance/PaeTec Comments at 1-2).

Finally, WorldCom argues that the interstate data are relevant evidence of Verizon's

provisioning processes especially where Verizon has stated that provisioning of interstate circuits is identical to its provisioning of in-state circuits (id. at 3). XO and CTC agree, stating that the Department's use of interstate data as evidence relevant to intrastate lines does not constitute regulation of interstate services (XO/CTC Comments at 3).

IV. ANALYSIS AND FINDINGS

Verizon presents its request as a Motion for Partial Reconsideration and/or Clarification. See 220 C.M.R. § 1.11(10). However, the Department has repeatedly held that 220 C.M.R. § 1.11(10) limits reconsideration to final Department Orders, not interlocutory Orders. See UNE Rates, D.T.E. 01-20, Order on AT&T Motion for Relief, at 3-5 (October 18, 2001). The August 9, 2001 Order that is the subject of Verizon's Motion is an interlocutory Order and not a final Order. Therefore, the Department denies Verizon's Motion because the Department does not allow for reconsideration or clarification of interlocutory Orders. However, our precedent against reconsideration or clarification of interlocutory orders does not prevent the Department from discussing an interlocutory Order.

When the Department referred to the "small sample size" of intrastate services, we were aware that the reported numbers represented the total universe of intrastate provisioned circuits. The choice of words was inapt, to be sure, but we were making the point that the total number of intrastate circuits was so small that performance results on those circuits might not tell us enough to render a well-founded decision (e.g., from a statistical standpoint, the accuracy of those results perhaps cannot be confidently relied upon),⁵ and may not give a very useful or

⁵ When the Department established performance standards in the Consolidated

(continued...)

detailed picture of Verizon's provisioning process. Thus, the Department found that it was necessary to include data related to interstate circuits as relevant evidence in this investigation in order to help us assess the statistical confidence of the intrastate results (given that intrastate and interstate circuits seem to be provisioned in apparently an identical manner).

The Department was very clear that it would not make findings or fashion remedies for interstate circuits, but would use the interstate data for informational or corroborative purposes in making findings and potentially ordering remedies for intrastate facilities.⁶ Interlocutory Order at 12. In order to rely on those data to make such findings, it is critical that Verizon's interstate data be subject to testing (discovery, cross-examination, etc.), so that the accuracy of the data can be verified. The Department cannot limit the scrutiny of Verizon's interstate report in the way Verizon suggests. To do so would require that the Department take the interstate data and conclusions that flow from those data at face value. Such a limitation would impair the utility of the data to this record and to fashioning an order on special access services.

⁵(...continued)

Arbitrations, the Department accounted for the low confidence in small sample sizes by establishing a minimum sample size below which penalties would not be assessed for performance. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 3-B at 34 (1997). The Performance Assurance Plan accounts for small sample sizes by performing a statistical calculation. Performance Assurance Plan, D.T.E. 99-271, at 8-10 (August 27, 2001).

⁶ Verizon focuses on the Department's statement that it is preempted from "investigating" the quality of service of federally tariffed special access services. The Department is not "investigating" the provision of interstate services for the purpose of making any findings relative to those services; rather, we are evaluating the provision of interstate services as relevant evidence. Thus, the Department is assuring itself that it has full and accurate information for its intrastate investigation.

Moreover, we are aware of no Department or federal precedent (procedural or otherwise), and Verizon has pointed to none, that would preclude the testing of the interstate data through the hearing process. Lack of jurisdiction for purposes of making legally binding findings concerning service quality and potential remedies on those interstate facilities does not preclude the Department from enquiring into the operation of non-jurisdictional facilities for the express and limited purposes of informing the Department about intrastate performance.⁷

Indeed, AT&T points to Department case law showing that the Department has relied on non-jurisdictional information to make findings about jurisdictional matters. See Commonwealth Gas Company, D.P.U. 93-222 (1994) (use of non-jurisdictional data to determine reasonableness of gas supply contracts); Boston Gas Company, Colonial Gas Company, and Essex Gas Company, D.T.E. 99-76 (1999) (same); see also Fitchburg Gas and Electric Light Company, D.T.E. 99-118, at 10 (2001) (in complaint proceeding, broad range of potential issues justifies the use of various investigative approaches to reach findings).

Finally, Department rules regarding discovery are designed to permit the parties and staff to gain access to relevant information in an efficient and timely manner. 220 C.M.R.

⁷ The Department is not second-guessing any conclusion reached by the FCC regarding the adequacy of Verizon's provision of special access services; the FCC has not made such a conclusion. See Commonwealth Electric Company v. Department of Public Utilities, 397 Mass. 361 (1986) (the Department cannot inquire into the reasonableness of wholesale electric rates set by the federal agency, but may inquire whether the local purchaser made a prudent decision purchasing electricity at that rate). Nor does the Department intend to reach a conclusion on services outside its jurisdiction. See Interlocutory Order at 12. Rather, the Department has stated that it intends to use the data on non-jurisdictional circuits to help it reach conclusions about circuits within its jurisdiction.

§ 1.06(6)(c). Department rules for discovery are guided by Massachusetts Rules of Civil Procedure, Rule 26, which states that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action, and appears reasonably calculated to lead to the discovery of admissible evidence. See also, Mass. Rules of Civil Procedure, Rule 26. The Department has already stated that it intends to use the interstate data to the extent it may prove to be evidence relevant to our intrastate findings. These data meet the Department's standard for discovery, especially in light of Verizon's statements that the provisioning process is the same for intrastate and interstate special access services. If Verizon has objections to admitting specific portions of the interstate data into the record of this proceeding, based on evidentiary standards, Verizon may object at the appropriate time. We will take up any such objection as it arises.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That Verizon's Motion for Partial Reconsideration and/or Clarification is hereby denied.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner